United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

To be Argued by
NANCY ROSNER

77-2006

United States Court of Appeals
For the Second Circuit

THOMAS LIPUMA,

Petitioner-Appellee,

-against-

COMMISSIONER OF CORRECTIONS,
et al.,

Respondents-Appellants.

PETITIONER-APPELLEE'S BRIEF

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STATEMENT OF FACTS

Procedural History of the Case

The appellee was arrested on the evening of January 10, 1972 along with two co-defendants James Doyle and Peter Raimondo in connection with the burglaries of two suites at the Berkshire Hotel. The indictment was filed on February 14, 1972 (A 68).* However it does not appear that any of the defendants was arraigned on the indictment until March 7, 1972 when Lawrence Hochheiser, Esq. filed a notice of appearance on behalf of James Doyle (A 32). Apparently for reasons of convenience, pursuant to a not uncommon procedure in New York state courts, Mr.Hochheiser also represented Mr. LiPuma, in name only, until May 16, 1972 when Michael Coiro was substituted as counsel (A 26).

In the weeks preceding Coiro's entry into the case Hochheiser filed a motion to suppress solely on behalf of his client, Mr. Raimondo (A 64-66). At the time of Coiro's initial appearance in the case an adjournment was granted, over the People's answer of ready, to permit defense counsel to make pretrial motions. Mr. Coiro indicated that

*Numbers in parentheses preceded by "A" refer to pages in the appellant's appendix.

Mr. LiPuma had, the previous evening, begun relating the circumstances of the case to him and additional time was required to formulate and prepare all necessary pretrial motions. An adjournment for that purpose until May 30, 1972 was granted (A81-82). Though an"omnibus" motion was filed including requests for a bill of particulars and for inspection of the grand jury minutes and dismissal of the indictment, no motion to suppress was ever filed by L. Puma's counsel nor was Hochheiser's motion joined in on the record.

The case dragged on until James Doyle pled guilty on May 3, 1973. Sometime prior to James Doyle's plea of guilty the prosecution had made the police officers available to the defense for interviewing. Mr. Quagliata, on behalf of Mr. LiPuma, arrived at the conference late and was informed by Mr. Hochheiser, rather than the witness officers, that they would testify that Doyle had consented to the search of his hotel room though in plain view were the proceeds of a recent burglary draped outside a suitcase on one of the two twin beds in the small hotel room (A 54).

Both lawyers concluded the motion was meritorious because of the inherent implausibility of the proposed testimony, corroborated by both clients' seperate and independent statements to their counsel that the police forced entry into the

suite and, having illegally entered, found no proceeds until a thorough search of the room was made, with the suitcase ultimately located under a bed (A 55, 70).

Some time during the summer of 1972, the defense employed James McNally, a retired first grade detective of the New York City Police Force, a licensed investigator to gather evidence to support the motion to suppress and the defense at trial. McNally's efforts on behalf of the defense disclosed evidence relevant to the motion to suppress and sought exclusively for that purpose. He interviewed hotel employees and obtained statements that Suite 612, the room adjoining the suite where the defendante were arrested, had been forcibly entered by the police on the night of the burglary and that the police might, at some point that evening, been given master keys by some hotel employee (A 11). These facts further confirmed the defendants' claims that Doyle had not consented to the search.

Then in July or August, 1972,* armed with the results of McNally's efforts, "Mr. LiPuma was advised by Coiro and Quagliata that a motion to suppress had been filed on his behalf" (A 11). However no motion was ever made, and no pretrial hearing was sought.

*Another long period of inactivity followed in the case until Sunday, November 4, 1973 when McNally, interviewed the complainants in one of the burglaries, Mr. & Mrs. Geibel, in their home in Sun City, Arizona (AA 90,103). (Numbers in parentheses preceded by "AA" refer to pages in the appellee's supplemental appendix.)

On the morning of the commencement of the trial, May 1, 1974, Mr. Justice Arnold Fraiman, the presiding judge, inquired of Mr. Coiro what pretrial motions, if any, remained undisposed. After inspection of his fil which failed to disclose the non-existent motion to suppress, Mr. Coiro advised the court a Wade hearing had previously been ordered upon the suggestion of the Assistant District Attorney. The Wade hearing on the admissibility of evidence of a lineup identification by Helen Geibel was held on May 1, 1974 and the motion to suppress the identification was denied. The next morning the trial commenced.

For the first time, mid-trial, Mr. Coiro requested a hearing on a motion to suppress. After lengthy consideration and colloquy, the court declined to entertain the motion to suppress. (See statement of case infra at p.7). With the questionable evidence thus submitted to the jury, the defendant was convicted and sentenced to five years imprisonment.

Present counsel was then retained to represent Mr. LiPuma. On the date of sentence, June 24, 1974 the court entertained a motion for a new trial predicated on three grounds. Foremost in the argument was the contention that the defendant had lost the right to make a meritorious motion to suppress through the gross dereliction of his trial counsel.

He also urged that he was prejudiced by the jury's inability to comply with the trial court's direction to strike from their minds the physical exhibits of the Robinson burglary, the testimony of Mr. Robinson himself and a fur salesman, all of which evidence was rendered incompetent against Mr. LiPuma by the court's dismissal for want of evidence of the three counts of the six count indictment relating to the Robinson burglary at the close of the People's case. Thirdly, he contended that his trial was prejudiced by the Assistant District Attorney's repeatedly improper arguments and comments during the course of his summation.

In connection with the first issue of the ineffective assistance of counsel, Mr. LiPuma asked for a hearing to prove that he had been advised by Coiro and Quagliata that the motion to suppress had been made. The trial court declined to hold a hearing and made no factual findings on the defendant's offer of proof (AA). All applications were denied.

In due course the conviction was affirmed by the Appellate Division without opinion, and the Court of Appeals denied leave to appeal.

LiPuma then brought an application in the United States District Court for the Southern District of New York

pursuant to 28 U.S.C. §2254 presenting all three claims passed upon by the New York Courts. The Honorable William C. Connor ordered an evidentiary hearing on LiPuma's claim of ineffective assistance of counsel. Subsequent to the hearing, on September 23, 1976 the district court issued its opinion and order granting the writ of habeas corpus unless LiPuma were retried by the state within sixty days.

Counsel then moved that LiPuma be admitted to bail. The application was heard and granted in the Court's chambers in the presence and over the objection of Rhonda Amhurst Bayer, then representing the office of the Attorney General.*

Subsequently on motion of the Attorney General and with the consent of the petitioner the district court issued a second order modifying the relief granted to provide that the writ of habeas corpus would issue unless within sixty days the state provided the petitioner the opportunity to make his motion to suppress. The Attorney General successfully sought a stay of that order and this appeal followed.

*The reference at page 2 of appellant's brief in a footnote that they were never advised that LiPuma was being released on bail is difficult to comprehend since it is false if construed to mean they lacked notice of the application and order; and it is irrelevant if construed to mean they lacked notice of the actual moment of release which followed by several days of bureaucratic delay the issuance of the district court's order.

The Trial and the Unmade Motion to Suppress

The first three counts of the six count indictment charged burglary, grand larceny and possession of stolen property arising out of the Geibel burglary while the second three charged the same statutory violations relating to the Robinson burglary.

As its main witness, the People called Helen Geibel who related that, upon returning to their hotel suite with her husband on the evening of January 10, 1972 she encountered a man sitting at the desk and rifling through it. (AA 27). She questioned his purpose there. He responded he was part of the hotel security force and was investigating some burglaries. At this point her husband took over and requested credentials from the stranger. Seizing upon the request to facilitate his departure, the stranger promised to return with proper identification right away. In the meanwhile, two other men emerged from the suite's bedroom area and also made a hasty departure. All three were followed to the elevator by Mr. Geibel (AA 29). Later it was discovered that a pill box valued at $5.00 was missing from the bureau in the bedroom and some change was missing from a purse though the paper currency in the purse was not disturbed (AA 33-35).

Mr. Geibel then telephoned the hotel staff who summoned the police. Within moments patrolmen arrived and questioned the Geibels who were able to provide only the vaguest of descriptions of the intruders: three white males, two of them latin types (AA43-44).

Later that evening the Geibels viewed three lineups each containing one of the defendants. Mr. Geibel was unable to make any identification of anyone. Mrs. Geibel identified only LiPuma as the man who had been seated at the desk.*

At trial** Mrs. Geibel was to repeat the identification

*Despite the apparent certainty of her facial identification, Mrs. Geibel insisted that LiPuma's clothing in the lineup was different from that worn by the man in her room (AA 44-45). However, when arrested within minutes after the burglary, LiPuma was wearing blue pants and a white shirt; the only change in his clothing being the addition of the blue suit jacket during the lineups. Mrs. Geibel insisted that the man identified at the lineups had changed into a different business suit (AA 45). However, none of the police officers remembered LiPuma changing clothes before the lineups (AA 14,79,84).

**The transcript indicates that the night before her in-court identification Mrs. Geibel was visited at her hotel by Assistant District Attorney Kreidman who refreshed her recollection with a single photograph (AA 11):

"REDIRECT EXAMINATION

BY MR. KREIDMAN:

Q. Mrs. Geibel, do you remember I visited you in your hotel last night?
A. Yes.
Q. And do you remember my showing you any photograph?
A. You showed me photographs.
Q. I showed you photographs or--
A. A photograph, yes.
Q. A photograph, Do you remember which photograph I showed you?
A. I don't remember, no. You said that these were photographs, that's all.
Q. All right. Did I show you-- How many did I show you?
A. Three
Q. Did I show you all three or did I show you one?
A. I don't remember.
Q. Okay. I don't remember either."(emphasis supplied).

of LiPuma* as the man at the desk with certainty despite her admission that she wasn't looking at his height (AA 42) and didn't remember anything about his hair (AA 45).

Though Mrs. Geibel's identification was one of the mainstays of the prosecution's case against LiPuma, its suspect character is reflected in the district court's factual findings:

> " On the witness stand, Mrs. Geibel recounted her verbal exchange with the 'man sitting at the desk,' whom she identified in court as the defendant. In testifying with respect to the events immediately thereafter, Mrs. Geibel recalled that, after her momentary exchange with the first stranger, 'I wasn't watching anybody. I was watching the whole scene, I guess.' In retracing the details of her line-up identification of LiPuma, Mrs. Geibel conceded during cross examination that she had recognized one or more police officers among the five men placed in line with LiPuma." (A 15).
>
> * * * *
>
> "Thus, had a suppression motion been pressed to a timely conclusion, and had it been successful, the prosecution's evidence would have pared down to -- at best -- the identification of defendant by an elderly witness whose direct observation of 'the stranger sitting at the desk' had lasted no longer than seconds, whose lineup identification of LiPuma had occurred under somewhat suggestive conditions, and whose husband, at the line-up, had been unable to identify LiPuma as 'the stranger' whom he had earlier observed during a significantly longer period than had his wife." (A 28).

*Indeed her in-court identification was complete with surname, a piece of intelligence presumably not gained from the intruder:

BY MR. KREIDMAN:

Q. Do you see this man here in Court?

A. Well, I would think I do.

Q. You think you do. Tell his Honor who you believe it is.

A. LiPuma or DiPluma.

To prove the second burglary the People offered the testimony of William Robinson. He and his wife returned to their suite on the evening of January 10, 1972 and discovered that it had been burglarized during their absence. Taken from the suite were one leopard coat, one mink jacket, one pair of cuff links, one ladies pin, one antique chain necklace and one ladies solitaire diamond engagement ring* (AA 16-17). At the time of the arrest part of the proceeds of the Robinson burglary** were recovered in the defendant Doyle's hotel room.***

Apart from the Geibel identification testimony the only other evidence against LiPuma derived from the entry, search and arrest in suite 613, all of which would

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*The transcript reveals that the antique gold chain necklace and the ladies diamond ring were never recovered (AA 18). Given the People's theory of the case, that all three defendants were arrested shortly after the burglaries in a small room in the hotel without having left the hotel, the failure to recover two costly items from the Robinson burglary is a small,but disquieting fact.

**At the close of the People's case counts 4, 5 and 6,relating to the Robinson burglary,and all evidence offered in support of those counts including the recovered property and Mr. Robinson's testimony were stricken because of the lack of evidence to connect them with LiPuma. Nothing in the transcript suggests that the lack of proof was a matter of surprise to the prosecutor.

***Appellant's brief at p.8 is in error in stating that "the officers found a half-open attache case containing the pin and the mink and leopard furs taken from the Robinson's room". The record indicates that the pin was found in a black attache case (AA 65) but the furs were found in an open Tourister suitcase (AA 67,84,124).

properly have been the subject of a motion to suppress because of the manner of the police entry into the room.

Police officer DeBona testified that at 8:30 p.m. on January 10, 1972 he was on radio patrol when he received a communication concerning a burglary at the Berkshire Hotel. His was the first police car at the scene. He interviewed the Geibels in their room, then participated in the search of the hotel. Though he did not participate in the entry of Doyle's room, Officer DeBona is a figure of some importance. Though he was one of the first of a small number of police officers who interviewed the Geibels, he was one of several police officers who participated in the burglary investigation and were placed in a lineup for viewing by the Geibels a scant two hours later (AA68,69). Indeed, while the lineup was in progress, Mrs. Geibel informed the police that she recognized officers in the lineup who had earlier been at the hotel (A15, AA148-9). Police officer Newham testified that he was working with DeBona on patrol that evening and participated in the search of the hotel and helped to check out new hotel guest registrations.

Detective William Donnelly was also on radio patrol on the evening of January 10, 1972. He responded to the Berkshire Hotel call by proceeding to Suite 1710 where he found Newham and DeBona interviewing the Geibels. His first assignment was a search of the lower floors of the hotel. His next assignment was to check the occupants of two suites 612 & 613 whose

occupants had registered that day. He proceeded first to room 613 and gave the following narrative of events there:

" Q. Did you go to room 613?
A. Yes I did.
Q. And tell the members of the jury what happened when you got to room 612? (sic).
A. Well, we knocked on the door and someone answered, 'Who is it?.' We said it was police. He said, 'What do you want?' and we said, 'There was a number of burglaries in the building and that we thought either his room was burglarized, or possibly could be burglarized, could we come in.'
Q. What happened?
A. Well, there was a pause, then the door opened.
Q. How long a pause was it, sir?
A. Oh, about a minute, two minutes."

* * * *

" Q. It was about a minute before the door was opened, is that correct, sir?
A. To the best of my recollection, yes.
Q. Tell us what you saw when the door was opened.
A. There was a man standing there in his underwear.
Q. Did you later ascertain his identity?
A. Yes.
Q. What is his name?
A. James Doyle.
Q. And what did Mr. Doyle do?
A. He let us in.

Q. Did he say anything before he let you in?
A. He said that he was sleeping and that we woke him up.
Q. And did you -- tell us what happened when he let you in.
A. Then we walked in and we were looking around the room. We looked under the beds and we saw Doyle looking over towards the closet.
Q. By the way, you say Doyle --what were the conditions of the beds?
A. Well, the bed nearest the window was made and the bed closest to the closet was messed up like someone was sleeping there.
Q. You saw Doyle looking over to the closet?
A. Yes.
Q. Tell us what happened.
A. Well, I opened up the closet door to look in and I saw a hand by the shelf.
Q. Now, you looked into the closet and you saw a hand by the shelf. What did you do when you saw that?
A. I closed the door and I stated there's nothing here.
Q. Was there anything in the closet besides a hand that you saw?
A. clothing.
Q. And what did you do then?
A. I motioned to my partner...
Q. Which one are you referring to?
A. Jimmy Greene I snapped my fingers and I go, we got one in the closet. So he got ready, he took his gun out and we put Doyle against the wall and I said, "come out....."
(AA 58-60)

Cross-examination elicited more:

" Q. Before going to 613 did you search any other rooms in the hotel?
A. No, sir, I did not.
Q. You went directly to room 613?
A. I was so ordered, yes.
Q. You were so ordered. Now, you came to 613, is that correct?
A. Yes, sir.
Q. Tell me exactly what happened when you arrived at room 613?
A. I knocked on the door. A voice said, "Who is it?" I stated it was the police. He said, "What do you want?" I said something to the effect that there were a number of burglaries committed in the building and that we have reason to believe that either your room was buglarized or would be burglarized.

Q. Now, when you had this conversation was the door open or closed?
A. Closed, sir.
Q. The door was closed?
A. Yes, sir.
Q. When was the door opened?
A. About a minute later.
Q. About a minute later. And did you walk right into the room as that point?
A.No, I had conversation with the man that opened the door.
Q. And the door was opened, is that correct?
A. Yes, sir.
Q. Now, while the door was opened could you see into the room?
A. No, sir.
Q. You could not see into the room?
A. I could see into the room partially.
Q. Waht portion of the room could you see?
A. I could see a dresser and I could see a window and I could see curtains.
Q. Now, this dresser that you saw, where was it?
A. It was on the left hand side of the wall.
Q. Well, from where you were standing at the door were you able to see the beds?
A. I may have been able to see the corner of one of the beds, I'm not sure.
Q. How far open did this man -- question withdrawn How far was the door open?
A. It was opened. I guess you call it fully.
Q. Open all the way?
A. Yes."

(AA 69-71)

Officer Donnelly's version of events was important to the dormant motion to suppress because it eliminated plain view as the basis for a further penetration of the room.

Officer Richard Powers, also on motor patrol that evening, responded to the Berkshire call. His assignment was to accompany Officers Donnelly and Greene in their check of the new registrants in suites 612 and 613. His version of events

there differed critically from Donnelly's:

" Q. Tell us what happened when you got to room 613, sir.
A. Patrolman Donnelly knocked on the door. A voice answered, 'yes.'
Patrolman Donnelly said, 'We're New York City police. We'd like to speak to you.'
And there was s silence, and then, 'What's it all about?' I think were some of the words used, and one of us mentioned that we wanted to make sure that you were all right, there had been trouble in the building and we would like to make sure that you were all right.
After a brief moment, the door opened, a man stood there in boxer shorts. Patrolman Donnelly engaged him in a conversation.
I went past the man to the end of the room which the window was open. There were drapes. I looked behind the left drape.
Q. Let me get one thing clear. The window was open?
A. That's correct.
Q. And you looked behind the drapes?
A. That's right."

* * * *

Q. Now, you said the door was opened, right?
A. Yes.
Q. Who was the first one into the apartment?
A. Well, I'd say it was Patrolman Donnelly. He engaged the man with a conversation about a foot into the door, into the doorway, a foot and a half.
BY MY COIRO:
Q. And then your testimony was, correct me if I am wrong, sir, that 'I walked past him into the apartment to the open window'?
A. That's right.
Q. In other words, you just pushed your way into that apartment?
A. No, I'm sorry, I didn't push my way in.
Q. Not that you physically pushed somebody, but the door was open and you stepped right through the apartment -- right through the doorway into the apartment?
A. That's correct.

Q. That's correct, right?
A. I walked in.
THE COURT: I'm sorry, I didn't hear you.
THE WITNESS: I walked in.

BY MR. COIRO:

Q. And you walked in without any invitation, didn't you?
A. Without invitation?
Q. Yes.
A. No.
Q. In other words, Mr. Doyle said 'You may enter? '
A. Mr. Doyle didn't say anything.
Q. You just walked in?
A. When we had the conversation -- that's correct. "

(AA 81-2,88-90).

Still a third narrative elicited by the court during recross examination of officer Powers confirmed the constitutional infirmity of the entry:

" THE COURT: Excuse me. Exactly what transpired when, as he opened the door, did he say something to you when he opened the door, or did you say something to him as soon as he opened the door?
THE WITNESS: When he opened the door, I can't recall the exact words.
THE COURT: In substance.
THE WITNESS: Patrolman Donnelly engaged in conversation. It went something like. 'Are you all right, mister? Anybody in here that's not supposed to be?' Or something to that effect. We had been looking for people in the building that had committed a crime.
THE COURT: What did he say in response to your -- Patrolman Donnelly?
THE WITNESSES: He said something that he was sleeping.
THE COURT: And what did you do during this time?
THE WITNESSES: I went right past the two of them.
THE COURT: I see

BY MR. COIRO:

Q. You went right past?
A. Right past the two of them. "

(AA 93-94).

At this juncture there erupted on the record

defense counsel's motion to suppress, hinted at by counsel's citation of standing cases on the record during Donnelly's testimony ( ) and referred to again after the critical Powers testimony (AA96-102). Clearly, in some off the record discussion, at least as early as Donnelly's testimony, the issue of the unmade motion to suppress had begun.

Defense counsel took the position that the motion had in fact been made, in that his partner Mr. Quagliata had joined Mr. Hochheiser's motion to suppress. In the Coiro - Quagliata professional association the division of labor was that Mr. Quagliata prepared the written submissions while Mr. Coiro conducted the trial (AA 103,105). Whether that joinder was a matter of record was uncertain.

In discussing the legal theories available to the people to justify the warrantless entry and search, the court openly stated that it would be inclined, based on the evidence thus far adduced, to find that Doyle had not consented and no emergency constituting exigent circumstances existed:

> " THE COURT: I'm sure there are more closely analagous cases than that, Mr. Kreidman. If the apartment is searched to the detriment of why seized holding whether or not there is standing to challenge the search. (sic)
>
> MR. KREIDMAN: There is another aspect, Your Honor, of a motion within trial and the Court can rule based on the evidence, based on the consent of Mr. Doyle and...
>
> THE COURT: I would be inclined on the basis of what I have heard, Mr. Doyle didn't consent to a search of his apartment.

MR. KREIDMAN: Then also under People v. Goldman, 19 New York Second affirming Justice Ringel on the testimony of Officers Powers, the police common law right to search under emergency situations.

THE COURT: There wasn't any emergency situation here, Mr. Kreidman.

MR. KREIDMAN: The officer just testified...

THE COURT: What was the emergency situation?

MR. KREIDMAN: He thought the man was in trouble.

THE COURT: There was no basis for that conclusion. I'll find that as a matter of law as well, Mr. Kreidman.

You're not seriously suggesting when he knocks on the door of the room and the man hesitates to open it and then he opens in his underwear he has a right to barge in and search the room because he thinks the man is in trouble?

MR. KREIDMAN: He hears there were burglars in the hotel.

THE COURT: And so therefore has a right to go into every room in the hotel and search every room in the hotel?

MR. KREIDMAN: That was in his mind.

THE COURT: I'm not concerned with what was in his mind, I'm concerned with what the law is.

MR. KREIDMAN: The law deals with what a reasonable man thinks.

THE COURT: I don't find that reasonable, Mr. Kreidman.

MR. KREIDMAN: All right, sir. If that's your decision that's your decision."

(AA 95-96).

With his armament of warrant exceptions thus depleted, the people's position was dealt a mortal blow by the court's more emphatic statement of its position on the issue of standing:

" THE COURT: I am now holding, as a matter of law, the defendant has standing to bring this motion."

(AA 102).

With the success of the suppression motion almost tangible, the prosecutor began to advance the waiver theory, now relied on in this Court. Thus, immediately after the Court's statement of its position on standing, the following

ensued:

" Now, having disposed of that issue, Mr. Kreidman there remains the question of the -- making the motion during trial.

What is the District Attorney's position with regard to that?

MR. KREIDMAN: Well, we cite, your Honor, to the Court, 710.40 when made and determined--

THE COURT: Yes, Mr. Kreidman; go ahead.

MR. KREIDMAN: The motion may be made for the first time during trial, but only to previous unawareness of facts constituting the basis of which other factors the defendant did not have a reasonable opportunity to make the motion before trial.

THE COURT: Yes, the defendant's position is he did make the motion before trial.

MR. KREIDMAN: But he obviously waived it, sir. He went right into the trial without bringing it to the Court's attention or the District Attorney's attention.

THE COURT: Assuming that his statement of what occurred is accurate, and assuming that Mr. Coiro was erroneous when he advised this Court that he knew of only one motion, how is the District Attorney prejudiced by permitting the defendant to have this issue litigated at this point?

MR. KREIDMAN: Because he's waived it, sir, right in the middle of the trial.

THE COURT: That's how you're prejudiced?

MR. KREIDMAN: Certainly, sir.

THE COURT: How are you prejudiced?

MR. KREIDMAN: Let's assume, sir, that the defense wins its motion--

THE COURT: He didn't knowingly waive it, Mr. Kreidman.

MR. KREIDMAN: I would suggest he did."

(AA 102-103).

The court's position on the waiver issue was justly sympathetic to LiPuma's plight:

" THE COURT: He's just explained the factor that his partner made the motion to join; he was unaware of it. Now, should a defendant for that reason alone, if he has a substantive right that goes to the heart of the People's case, be deprived of his opportunity to have that right litigated on that technical ground?

MR. KREIDMAN: I would argue, yes.

THE COURT: That is the sole basis for your argument?

MR. KREIDMAN: That there's a waiver, yes, sir, there has been no evidence...

THE COURT: What is the prejudice to the District Attorney to allow him to litigate this at this time? Will you state to the Court what prejudice the District Attorney has suffered if I permit this matter to be litigated at this time?

(Pause.)

THE COURT: The record will reflect a long silence on the part of the District Attorney.

I gather you are not prejudiced in any way.

MR. KREIDMAN: Except it's a violation of the statute, sir, 710.40."

(AA 105-06).

As matters progressed and the remifications of the successful motion to suppress became apparent, this "technical ground",, so belittled by the court at first blush, became the altar of sacrifice for LiPuma's motion to suppress. Though the issue was raised on the first day of trial, during Donnelly's testimony, the granting of the motion required the striking from evidence of the fruits of the Robinson burglary and the police officers' testimony of LiPuma's emergence from the closet.*

This latter more subtle evidentiary aspect of the motion did not become apparent to the litigants in their quandry over the effect of striking the physical exhibits. However, its critical significance was not lost on the district court:

> "The 'road not taken' in the present case had thus been critical to the LiPuma defense: Only the stark picture of LiPuma, crouched inside the Berkshire closet, huddled close to Raimondo and hence to the Geibel pill box, was enough to confirm the otherwise dubious Geibel testimony and to foreordain LiPuma's conviction."

(A 28).

Recognizing the merit in the inevitable motion for a mistrial which would follow the striking of all the evidence except Mrs. Geibel's testimony, the court sought to exact a quid pro quo which defense counsel was quick to accept though it cavalierly abandonned the crucial mistrial motion and rendered meaningless the granting of the motion to suppress. The proposal was bluntly put:

> " THE COURT: In view of the fact that I think that the District Attorney would be sorely prejudiced if it were necessary to declare a mistrial in this case, in view of the age of his complaint witness and the fact that they have come from several thousand miles away to testify in this trial, the fact that at this stage he has practically completed the presentation of the People's case and further view of the fact that this matter was not disposed of prior to trial by reason of the negligent failure of defense counsel to advise the court in advance of trial in response to the Court's specific questions as to whether any motions were pending, that there were no motions pending with regard to the suppression of physical evidence; it seems to me that unless defendant was fully prepared to waive any possible claim of prejudice he might have by the introduction into evidence of this matter The Court would under no circumstances consider the determination of a motion to suppress at this stage of the trial.
>
> In view of the express waiver of any such show of prejudice by the defense counsel and by his client The Court will grant the defendant an opportunity to have the motion to suppress which was apparently made prior to trial resolved at this...."

(AA 111-112).

Having extracted the bargain with defense counsel the court then inquired whether either side would offer further

evidence on the motion (AA 115). Probably prompted by the knowledge that he had no further evidence, the prosecutor resurrected his waiver argument which left the court still totally unmoved to accept the notion that the defendant had waived anything:

> " MR. KREIDMAN: I didn't know. I didn't even know the court would grant the defendant's motion
> THE COURT: If you had read the cases you would learn that the law requires me to grant such a motion.
> MR. KREIDMAN: When I saw the waiver section...
> THE COURT: I saw no language that refers to waiver. I see language that gives the Court discretion in determining whether or not to allow the hearing to be held during trial.
> MR. KREIDMAN: Well if I...
> THE COURT: If you find me some cases that says the defendant under these circumstances has waived his right to a hearing I'll be glad to see those cases but again I suggest that you do some legal research first."

(AA 116).

With the motion to suppress thus sporadically in progress, the business of the trial continued before the jury. Officer James Greene, Officer Donnelly's partner and the third and last of the police present at the execution of the entry and search, recollected some additional evidence:

> " Q. Tell us about the rest of the communication between your partner and Doyle.
> A. Once the door to room 613 was opened by Doyle or Johnson, which was the first knowledge I had of the person, my partner conversed with him.
> He did state, 'All right, search the premises -- not to search the premises, but to come in and check the security of the premises.'

(AA 121)

The timing of Officer Greene's testimony, combined with the obvious, if not critical, importance of Doyle's alleged flirtation with a consent search might give a reasonable trier of fact pause. When considered against Doyle's extensive background as a professional criminal and the claim of the other officers that, once inside the room, the stolen furs were laying in plain view on a bed strewn outside an open suitcase, the aroma of overzealous testimony arises.

Greene's further testimony turned healthy scepticism to moral certainty. Handing Officer Greene People's Exhibit 14 in evidence, a photograph of room 613, the prosecutor asked Greene to mark the spot where the fur laden Tourister luggage had been found:

> " Q. I show you People's exhibit 14, in evidence (Exhibit handed to the witness).
> Q. I ask you to mark thereon where the Tourister luggage was with the fur coats in it?
> THE COURT: Your testimony is that it's underneath the bed?
> THE WITNESS: That's correct, Your Honor.
> THE COURT: You may mark it." (emphasis added).

(AA 126)

Both mark and mouth concurred. Plain view was plainly untrue.

To all appearances,* all that remained was the oral argument prior to the court's decision of the motion to suppress.

*In a final effort at the merits, the prosecutor offered to prove that the search had been consented to by hotel employees. Noting the legal inconsequence of such testimony, and in an effort to advance the inevitable, the court dispensed with the necessity of calling live witnesses and assumed the truth of the prosecutor's offer (AA 140). The hearing was declared closed and the court asked for final arguments on the motion to suppress (AA 141).

With the success of the motion thus apparent, the focus suddenly shifted to the more technical terrain of waiver. Unable to produce a record which reflected the understanding of the parties that defense counsel's partner had joined Hochheisher's motion to suppress, the inquiry focused on the quality of the proof that in fact the motion had been joined, whether on or off the record. Where previously the court had unhesitatingly accepted defense counsel's unsworn representation of the fact,

> " THE COURT: Mr. Coiro, as an officer of this Court, has testified the motion was made, and his partner has testified as an officer of the Court the motion was made.
>
> MR. KREIDMAN: Sir, 'I was in a hotel last week with Patrolman Greene checking out keys', and there is a bit of testimony as to when he made -- and as to whether or not he checked out the key and with Room 1710. 'I don't remember that.' Memories are subject to failure.
>
> THE COURT: They made a representation to this Court, Mr. Kreidman. Now, I'm accepting their representation.
>
> MR. KREIDMAN: It's very simple for them , sir, to just order the minutes at that time. They made the representation it was on the minutes. Very simple to trace it down.
>
> I would ask the court to impose that burden upon the--
>
> THE COURT: Not if you have some doubt as to whether the motion was made.
>
> MR. KREIDMAN: I certainly do.
>
> THE COURT: What is the basis for your doubt?
>
> MR. KREIDMAN: Human memory, taking place..."

(AA 111-112).

new and more stringent conditions were imposed on defense counsel to prove the motion had been joined. Simply put, the Court demanded corroboration of defense counsel's

representation* from some official source. Not surprisingly, the trial justice before whom the motion had allegedly been joined had no recollection of the matter (AA 151); nor did Assistant District Attorney Andrews, who was then in charge of the case. With the possibilities for corroboration thus exhausted, the trial court held that it was bound by the official record** and declined to entertain the motion to suppress.

At the time of sentence, present counsel applied for a new trial on grounds of incompetence of trial counsel in failing to make the motion to suppress and requested an evidentiary hearing to prove that LiPuma had been told by his trial counsel that the motion to suppress had been made. The request for a hearing and the application based on incompetency of counsel were denied.

---

*The source of the court's authority thus to amend New York law is not apparent. It is critical to note that the court did not reject defense counsel's representation or offers of sworn testimony (AA 136-37,144) for lack of credibility, but imposed a novel requirement of corroboration.

**Clearly, the enforceability of an agreement between prosecution and defense, such as was alleged here, in no way depends on the existence of an "official record". This Court has recently so held in Palermo v. Warden of Green Haven Prison, 545 F.2d 286 (2d Cir. 1976).

Armed with the trial court record, LiPuma petitioned the United States District Court for a Writ of Habeas Corpus based primarily on the incompetence of trial counsel in failing to make the motion to suppress. The district court heard evidence which substantially recounted the developments in state court. Additional facts developed at the habeas corpus hearing included the investigative efforts undertaken in support of the motion to suppress (A90, 103); corroborated by LiPuma's and Doyle's version of events (A 70,81,82,96,97); that LiPuma had been informed the motion had been made (A87,98,99); and that LiPuma had never suggested, in any way, a desire to abandon the motion (A99).

In relevant part, the district courts findings were:

> " After fuller discussion with their client, and a pooling of information with Hochheiser, co-counsel for LiPuma jointly concluded -- as had Hochheiser -- that the facts, at least according to their client, supplied the stuff of which a meritorious suppression motion is made: the events preceding the police entry of Suite 613 did not, after all, bespeak the probable cause of exigency of circumstances that would otherwise have justified a warrantless search without consent. In July or August 1972, LiPuma was advised by Coiro and Quagliata that a motion to suppress had been filed on his behalf.
>
> At some time between the summer of 1972 and the spring of 1973, a private investigator was hired at the joint expense of LiPuma and his co-defendants. The investigator reported to counsel the results of his interview with a hotel clerk employed at the Berkshire during the time of the occurrences in question: The clerk disclosed that the door adjacent

to suite 613 had been damaged on the evening of January 10, 1972, and that, at some point during that evening, he had supplied the police with a master key

(A 10-11).

* * *

" While the state indictment was still pending against Doyle, Hochheiser briefed Quagliata on the substance of the statement(s) elicited from the police officer(s). Quagliata, like Hochheiser, realized that 'there would be a problem in proving the motion to suppress.' Nevertheless, armed with the defendant's version of the events in Suite 613, a version reinforced in some of its aspects by the statement of the Berkshire Hotel clerk, Quagliata was determined to press the motion on LiPuma's behalf. After all, a suppression motion was, in Quagliata's view, crucial to LiPuma's defense; it would constitute a challenge to evidence upon which no fewer than three of the six indictment counts were predicated and upon which the remaining counts in substantial part rested ".

(A 13-14).

* * *

" What happened to LiPuma's suppression motion after Quagliata's May 16, 1972 appearance before Justice Leff until the May 2, 1974 commencement of LiPuma's trial remains to date a matter of some mystery. In an attempt to reconstruct the events that might provide an answer to that question, Quagliata would later rather vaguely recall that he had, at some point during the two-year period, joined in Hochheiser's motion either on record or off the record with the consent of the Assistant District Attorney then in charge of the case against LiPuma and his co-defendants. But neither the state court stenographic transcripts nor the former prosecutor's best recollection would confirm Quagliata's memory. Nor, for that matter, does it appear that either Quagliata or Coiro had, with respect to the suppression motion, ventured by personal inquiry beyond the intelligence

garnered from the defendants' private investigator, Hochheiser, or the co-defendants themselves during the two years preceding LiPuma's trial. What is clear enough, however, is co-counsel's failure to press a hearing on the motion prior to trial.

Coiro for his part, would later recall that

> 'I am a pretty busy trial lawyer, on trial most of the time. I had forgotten what Mr. Quagliata had told me, that he joined in the motion orally before one of the judges.'

By the time of LiPuma's trial, Coiro had in fact forgotten the suppression motion entirely; in advance of trial, he had consulted his case file, but it had not reflected the pendency of such a motion.

Having participated in lengthy and frequent sidebar discussions with counsel during the preceding days, Justice Fraiman finally resolved on May 8, 1974 that defendant's motion to suppress -- which he himself had earlier characterized as a matter 'go[ing] to the heart of the People's case' -- could not be considered mid-trial. The Court was bound to deny a hearing on the motion, Justice Fraiman concluded, by the terms of Section 710.40 of the New York Criminal Procedure Law. The statute at that time provided in relevant part:

> '1. A motion to suppress evidence must be made * * * with reasonable diligence prior to trial.
>
> 2. The motion may be made for the first time during trial when, owing to previous unawareness of facts constituting the basis thereof or to other factors, the defendant did not have reasonable opportunity to make the motion before trial* * *.'

> Justice Fraiman determined that Section 710.40 did not comprehend the circumstances before him and that it thus would not accommodate a hearing on the proposed motion, raised as the latter was after trial had begun. An embarrassed Quagliata and a discomfited Coiro were hardly able to suggest otherwise. For Thomas LiPuma, defense counsel's remembrance had come too late."

(A 18-20).

After its detailed factual findings, the district court set forth this Circuit's standard for the effective assistance of counsel:

> " Thus, to prevail on a claim of constitutionally inadequate representation, a petitioner -- at least in this jurisdiction -- must meet the burden of proving that his counsel's performance was so 'woefully inadequate 'as to shock the conscience of the Court and make the [resultant] proceedings a farce and mockery of justice.'' United States v. Currier, 405 F.2d 1039, 1043 (2d Cir.), cert. denied, 395 U.S. 911 (1969), quoting United States v. Wight, 176 F.2d 376, 379 (2d Cir. 1949), cert. denied, 338 U.S. 950 (1950). Indeed only '[i]f counsel's representation is so 'horribly inept' as to amount to a 'breach of his legal duty faithfully to represent his client's interests',' will a reviewing court be satisfied that ;there has been a lack of compliance with the fundamental fairness essential to due process.' United States ex rel. Maselli v. Reincke, 383 F.2d 129,132 (2d Cir. 1967), quoting Kennedy v. United States, 259 F.2d 883, 886 (5th Cir. 1958), cert denied, 359 U.S. 994 (1959). That heavy burden will not be borne successfully absent, at the least, a showing that 'counsel was both grossly incompetent, and that 'the essence of a substantial defense' was thereby blotted out.' United States ex rel King v. Schubin, 522 F.2d 527,529 (2d Cir. 1975), cert denied, U.S. (197), quoting United States ex rel. Testamark v. Vincent, 496 F.2d 641,643 (2d Cir. 1974), cert denied, 421 U.S. 951 (1975).

> Decisional precedent in this Circuit makes it clear that "'[e]rrorless counsel is not required', * * * and 'tactical errors or mistakes in strategy', * * * even if established, will not suffice to meet the high burden placed on the [petitioner]." United States v. Matalon, supra, at 1218-19, quoting United States v. Garguilo, 324 F.2d 795,796 (2d Cir. 1963). Moreover, as indicated above, it is a familiar principle that the inadequacy-of-counsel question has invariably as its point of reference "the character of the resultant proceedings." United States v. Wight, supra at 379; see United States ex rel. Crispin v. Mancusi, 448 F.2d 233,237 (2d Cir.), cert denied, 404 U.S. 967 (1971).
>
> This Court concludes that the stringent standard outlined above is satisfied by the sins of counsel's omission that were visited upon petitioner in the state trial court."

(A 24-25).

At some length the district court related its factual findings to that standard:

> " The present case, however, is not one in which 'there were no circumstances revealed to [defense counsel] by [defendant] or anyone else which [would] indicate[] that an illegal search and seizure had been made by the police.' United States ex rel. Boucher v. Reincke, 341 F.2d 977,981 (2d Cir. 1965). Nor is this a case in which a suppression motion by defendant would have been of obvious futility. See, e.g., United States v. Yanishefsky, supra, at 1057; United States v. Sanchez, 483 F.2d 1052,1057 (2d Cir. 1973). Rather, the record discloses that Coiro and Quagliata had had sufficient reason to determine -- and, indeed, they had in fact determined -- that a suppression motion by LiPuma would not be foredoomed, i.e., that, on a hearing of such a motion, the People might not have been able to bear its 'heavy burden' of proving consent to the search and seizure in Suite 613. People v. Whitehurst, 25 N.Y.2d 389 (1969).

> Respondents reminder that, in the face of an 'overwhelming' prosecution case, 'there is not too much that the best defense attorney can do,' United States v. Katz, 425 F.2d 928,930 (2d Cir. 1970), is singularly misdirected to the circumstances presently under consideration. The prosecution's case against LiPuma drew its strength from two mutually reinforcing sources: Mrs. Geibel's testimony, on the one hand, the evidence derived from the search of Suite 613, on the other. To eviscerate that case, clearly more than a Wade hearing was needed. Thus, had a suppression motion been pressed to a timely conclusion, and had it been successful, the prosecution's evidence would have pared down to -- at best -- the identification of defendant by an elderly witness whose direct observation of 'the stranger sitting at the desk' had lasted no longer than seconds; whose line-up identification of LiPuma had occurred under somewhat suggestive conditions, and whose husband, at the line-up, had been unable to identify LiPuma as 'the stranger' whom he had earlier observed during a significantly longer period than had his wife. The 'road not taken' in the present case had thus been critical to the LiPuma defense; only the stark picture of LiPuma, crouched inside the Berkshire closet, huddled close to Raimondo and hence to the Geibel pill box, was enough to confirm the otherwise dubious Geibel testimony and to foreordain LiPuma's conviction."

(A 27-28).

The district court emphatically rejected the notion advanced in the state court under a waiver theory; presented in the district court as trial strategy; and urged in this Court again as waiver; that LiPuma had knowingly and voluntarily relinquished his motion to suppress:

> "Respondent suggests, however, that the default now in question was no more nor less than a deliberate choice of trial strategy by defense counsel and, as such, one which this Court may not properly second-guess. See, e.g. United States v. Yanishefsky, supra, at 1332; United States ex rel. Walker v. Henderson, supra, at 1314;

> United States v. Massimo, supra at 326; United States v. Matalon, supra, at 1219. But respondent does not identify -- nor does this Court independently divine -- any possible tactical altar at which LiPuma's suppression motion might have wittingly been made a sacrifice. See Simmons v. United States, 390 U.S. 377 (1968). This Court is convinced, rather, that -- as had been clear from the first -- the LiPuma defense had had nothing to lose and possibly everything to gain from a timely motion to suppress. That motion was not in truth abandoned through the considered choice of defense counsel and client; it was, instead, somehow lost to petitioner in the chasm apparently formed by the division of co-counsel's labors.
>
> This Court thus concludes that the charge of ineffective assistance of counsel -- always serious in its implications, but most often unwarranted -- is fully supported by the peculiar facts disclosed by the record at bar.

(A 28-29).

Finally, the district court disposed of the argument that the waiver of the motion to suppress, which would have eviscerated the people's case, could be harmless error:

> "As this Court has earlier indicated, a suppression motion by LiPuma would have presented the state trial court with what was, at the least, a close question; it thus cannot be concluded beyond a reasonable doubt that the motion, had it been advanced, would have ultimately failed. And, as this Court has already observed, had LiPuma prevailed on the motion, the remaining prosecution evidence would not have been of sufficient weight to have foreclosed the possibility of LiPuma's acquittal. Hence the reasonable possibility of prejudice to petitioner as the result of his counsel's glaring neglect is clear."

(A 29-30).

POINT IA

THE FEDERAL HABEAS CORPUS COURT HAD JURISDICTION TO ENTERTAIN THIS PETITION SINCE, THE COMPLETE LACK OF ANY EVIDENCE OF AN INTENTIONAL BYPASS OF THE STATE COURT FORUM AND THE UNDISPUTED ABSENCE OF ANY STRATEGIC CONSIDERATION TO MOTIVATE SUCH A BYPASS, DEMONSTRATE THAT THE STATE DID NOT AFFORD A FULL AND FAIR OPPORTUNITY TO LITIGATE A MERITORIOUS FOURTH AMENDMENT CLAIM IN THIS CASE.

Appellant's first and primary contention is that LiPuma has "waived his claim for purposes of federal habeas review" (Appellant's brief at 17). The theoretical underpinnings of this position rest on an incompatible miscegenation of the concepts of intentional bypass of Fay v. Noia, 372 U.S. 391 (1963) and the full and fair opportunity doctrine of Stone v. Powell, ____U.S.____ 96 S.Ct. 3037, 49 L.Ed.2d 1067 (1976).

As Mr. Justice Powell's opinion for the Court in Stone demonstrates, the history of federal habeas corpus jurisdiction reveals opposing trends. The Great Writ, rooted in the Constitution and codified in 28 U.S.C. §§2254 and 2255, has expanded substantively from its early limit to jurisdictional questions to its contemporary reach to all federal law questions. While the writ's substantive

coverage has greatly expanded, procedural limitations have been engrafted, to prevent the federal habeas corpus courts from becoming courts of first, rather than last, resort.

Thus, state court judgments which deny federal claims on the basis of adequate state grounds bar federal jurisdiction generally, whether habeas corpus jurisdiction is invoked or direct review in the Supreme Court is sought. This limitation advances two worthy goals: preservation of the balance of power between state and federal governments which is integral to our federal system, and minimization of the occasions for federal courts to issue advisory opinions on state law questions.*

However, since it is a self-imposed jurisdictional limitation which bars review of a state's denial of federal rights, the question of what constitutes an adequate state ground is itself uniquely a federal issue.

Such state law grounds may be either substantive or procedural. Where state rules of procedure are invoked to defeat federal rights, the legitimacy of the state's interest

*Compare the operation of the federal electronic surveillance statutes 18 U.S.C. 2510, et seq.which permit more stringent state laws and interpret and apply them in federal trials where the fruits of state court orders are offered. United States v. Manfredi, 488 F.2d 588 (1973). Similarly, where federal diversity jurisdiction is invoked, the district courts interpret and apply state law.

in enforcing that procedure is a uniquely delicate federal question. Henry v. Mississippi, 379 U.S. 43 (1965).

Thus, where the invocation of a state procedural rule is discretionary, it may not be enforced to defeat a federal claim. The Supreme Court's opinion in Williams v. Georgia, 349 U.S. 375, at 382-3 (1955) emphasizes the need for federal scrutiny of the exercise of such discretion:

> " A state procedural rule which forbids the raising of federal questions at late stages in the case, or by any other than a prescribed method, has been recognized as a valid exercise of state power. But, where a State allows questions of this sort to be raised at a late stage and be determined by its courts as a matter of discretion, we are not concluded from assuming jurisdiction and deciding whether the state court action in the particular circumstances is, in effect, an avoidance of the federal right. A state court may not, in the exercise of its discretion, decline to entertain a constitutional claim while passing upon kindred issues raised in the same manner."

546 F.2d at 1218.

Indeed, the very existence of discretionary power to suspend or invoke a procedural requirement is persuasive proof that no vital state interest is at stake. "If some deviation from regular procedure can be tolerated, a few more can hardly be seriously descriptive." Sandolow, Henry v. Mississippi and the Adequate State Ground: Proposals for a Revised Doctrine, 1965 Sup. Ct. Rev. 187 at 225 n.3.

From the application of these principles to this case, emerges an excellent example of a state court's improper invocation of procedure over the substances of a meritorious federal claim. First, the failure to make a pretrial motion to suppress was solely attributable to counsel's dereliction of his duty. Second, both parties agreed that no additional evidence was necessary to decide the issue. Third, the trial court extracted an agreement from defense counsel to waive any mistrial motion in exchange for the motion to suppress. Fourth, as the trial court's comments reflected, the motion was both meritorious and important to the defense. Fifth, also as noted by the trial court, the defendant himself neither knew of nor contributed to counsel's procedural default.

Finally, and most importantly, the people would suffer no prejudice from the court's exercise of discretion to permit the motion to be made during trial. Prejudice to the state must certainly be what the valid state interest is about. This colloquy between court and prosecutor says it all:

> " Now, having disposed of that issue, Mr. Kreidman there remains the question of the -- making the motion during trial.
>
> What is the District Attorney's position with regard to that?
>
> MR. KREIDMAN: Well, we cite, your Honor, to the Court, 710.40 when made and determined--
>
> THE COURT: Yes, Mr. Kreidman; go ahead.

MR. KREIDMAN: The motion may be made for the first time during trial, but only to previous unawareness of facts constituting the basis of which other factors the defendant did not have a reasonable opportunity to make the motion before trial.

THE COURT: Yes, the defendant's position is he did mkae the motion before trial.

MR. KREIDMAN: But he obviously waived it, sir. He went right into the trial without bringing it to the Court's attention or the District Attorney's attention.

THE COURT: Assuming that his statement of what occurred is accurate, and assuming that Mr. Coiro was erroneous when he advised this Court that he knew of only one motion, how is the District Attorney prejudiced by permitting the defendant to have this issue litigated at this point?

MR. KREIDMAN: Because he's waived it, sir, right in the middle of the trial.

THE COURT: That's how you're prejudiced?

MR. KREIDMAN: Certainly, sir.

THE COURT: How are you prejudiced?

MR. KREIDMAN: Let's assume, sir, that the defense wins its motion—

THE COURT: He didn't knowingly waive it, Mr. Kreidman.

MR. KREIDMAN: I would suggest he did."

(AA 102-103).

* * *

" THE COURT: He's just explained the factor that his partner made the motion to join; he was unaware of it. Now, should a defendant for that reason alone, if he has a substantive right that goes to the heart of the People's case, be deprived of his opportunity to have that right litigated on that technical ground?

MR. KREIDMAN: I would argue yes.

THE COURT: That is the sole basis for your argument?

MR. KREIDMAN: That there's a waiver, yes, sir, there has been no evidence...

THE COURT: What is the prejudice to the District

> Attorney to allow him to litigate this at this time? Will you state to the Court what prejudice the District Attorney has suffered if I permit this matter to be litigated at this time?
>
> (Pause)
>
> THE COURT: The record will reflect a long silence on the part of the District Attorney.
>
> I gather you are not prejudiced in any way.
>
> MR. KREIDMAN: Except it's a violation of the statute, sir, 710.40." (emphasis supplied).

Statement of Facts at p.19

The long silence is as yet unbroken. It speaks most eloquently of the truth that the state relied on the facade of a procedural rule here solely to defeat a federal claim, after repeated and varied attacks on the merits had failed.

Compare the court's analysis in O'Berry v. Wainwright, 546 F.2d 1204 (5th Cir. 1977). There crucial evidence at the defendant's rape trial was a police officer's testimony that a search of the defendant's car revealed that the rear seat had been wiped free of fingerprints. This evidence was crucial as corroboration and because it permitted an inference of guilty knowledge. No motion to suppress was made before or during trial and no direct appeal was taken. The suppression issue was raised for the first time in a collateral attack in state court.

After discussing Williams v. Georgia, supra and its implications for the state's discretionary invocation of procedural rules, the court held:

> "Florida's contemporaneous objection rule and fundamental error rule do not fall within this exception since they do not

> allow questions of this sort to be raised at a late stage and be determined by its courts as a matter of discretion."

546 F.2d at 1218

In this case, unlike O'Berry, the procedural rule invoked was discretionary not absolute and falls under the Williams rationale.

O'Berry's analysis is relevant to this case in other respects. There, the Florida appellate court, reviewing the trial court's denial of his collateral attack, ruled for the first time that it would entertain O'Berry's direct appeal and his motion to suppress. The facts being undisputed the motion to suppress was determined and denied on the merits by the state appellate court.

After his unsuccessful state collateral attack, O'Berry instituted a petition for habeas corpus in federal court. In addition to presenting his Fourth Amendment claims, for the first time he alleged ineffective assistance of counsel, in part, for failure to make a timely motion to suppress.

The habeas corpus court sustained O'Berry's Fourth Amendment claims, but denied the claim of ineffective assistance of counsel. Though the state appealed that aspect of the district court's order regarding the merits of the suppression motion, O'Berry never appealed the ruling concerning the ineffective assistance of counsel. The Fifth Circuit

specifically noted that its analysis omitted any such consideration, being limited strictly to consideration of what constituted "full and fair opportunity":

> "Finally, we conclude that Florida's rule requiring contemporaneous objection does not unduly burden or interfere with federal rights. Petitioner was represented throughout his state trial by counsel and in no phase of this case's tortuous history has any court found that Petitioner failed to receive effective assistance of counsel during his trial. Furthermore, after raising it in the District Court, Petitioner has not even urged the effectiveness of counsel in his brief or oral argument before us so the issue is no longer open for our review."

546 F.2d at 1218.

Appellant places weight, indeed unsupportable reliance on United States ex rel. Tarallo v. LaVallee, 433 F.2d 4 (2d Cir. 1970). There the fruits of a search conducted under the authority of a search warrant were introduced at the defendant's trial. Though the warrant was supplied to the defense more than five months before trial, no pretrial motion to suppress was made. Nor was any constitutional objection made to the introduction of the fruits during the trial, though some lesser evidentiary objections were lodged.

The first mention of a suppression motion came from the trial court after all the people's evidence was concluded. Even thus alerted to the possible federal claim,

the defense never alleged that the warrant had issued on less than probable cause and never requested an evidentiary hearing. Thus Tarallo's factual posture differs critically from this case in that no constitutional objection was made during trial, thus defeating the state's possible interest in a contemporaneous objection.

More importantly, Tarallo differs from this case because of the then prevailing New York law. As the Tarallo court found, Sections 813(c) and d(4) had been uniformly construed by the New York Courts to preclude mid-trial motions to suppress. In practice, no discretion existed to suspend or implement the procedural rule. Thus, the Williams rationale, scrutinizing the state's discretionary invocation of procedural rules to bar federal claims was wholly inapplicable to that case.

Here not only did state law vest the trial court with discretion to entertain the motion during trial but, as the transcript plainly reflects the court evidenced every intention of exercising that discretion because of the merit of the motion and the plight of the defendant.

Indeed, having indicated clearly on the record its view that the motion was well founded and the people would suffer no prejudice from its mid-trial decision, the court inaugurated a new rule of procedure to defeat

the motion, declaring the sworn testimony of two attorneys insufficient proof, as a matter of law, that the motion had been made pretrial. Such novelty in procedural requirements can never constitute adeqiate state grounds to bar federal claims. N.A.A.C.P. v. Alabama, 357 U.S. 449 at 457-58 (1958).

It is important to observe that the trial court, initially unhesitatingly accepted defense counsel's unsworn representation that the motion had been made pretrial:

> " THE COURT: Mr. Coiro, as an officer of this Court, has testified the motion was made, and his partner has testified as an officer of the Court the motion was made.
>
> MR. KREIDMAN: Sir, 'I was in a hotel last week with Patrolman Greene checking out keys', and there is a bit of testimony as to when he made -- and as to whether or not he checked out the key and with Room 1710. 'I don't remember that.' Memories are subject to failure.
>
> THE COURT: They made a representation to this Court, Mr. Kreidman. Now, I'm accepting their representation."

(AA 135).

Inexplicably, counsel's later offer to testify under oath was totally rejected (AA 147). Thus, the trial court did not a: the finder of facts reject defense counsel's position for lack of credibility. Rather, it held, as a matter of law, not only that the offer of sworn testimony was insufficient, but that official corroboration on the issue was required. This is a paradigm case of unforeseeable, because unconceived, novel state procedural requirements,

totally insufficient as"state grounds" to bar federal habeas corpus jurisdiction.

An example of this principl is reflected in Hardin v. Estelle, 365 F.Supp 39 (W.D. Tex. 1973) aff'd 484 F.2d 944 (5th Cir. 1973). There, the defendant applied to the state trial court for compulsory process to produce concededly material alike witnesses. The trial court denied the application on the merits. The state appellate court, avoiding the merits, found the application wanting in form because the defendant had failed to attack an offer of proof in affidavit form to his motions.

The federal habeas corpus court first noted that compulsory process was not an unqualified right and the substance of the demanded witness's testimony was relevant to the trial court's decision whether to issue the subpoena. However, the habeas court also found that the requirement of an accompanying affidavit was previously unknown in Texas law and could not be enforced to defeat the defendant's federal claim. 365 F.Supp at 43-44.

Thus both because of the discretionary nature of the state's procedural barrier, and the inauguration of novel procedural requirements the doctrine of adequate state grounds cannot be invoked to bar federal habeas corpus relief in this case.

An analogous though somewhat broader concept limiting federal habeas corpus jurisdiction is the doctrine of deliberate bypass. Fay v. Noia, 372 U.S. 391 (1963). In essence, this requires that defendants not purposefully forego the opportunity to present federal claims in state court, in the hope of more favorable reception later on in a federal forum.

However, neither of these doctrines control here because both are bottomed on the assumption that the defendant himself somehow knowingly and intelligently chose not to present his federal claim in state court. While much judicial thought has been devoted to distinguishing these doctrines, the precise demarcation of each is unimportant here. It is important only to note that they both depend fundamentally on the assumption of the defendant's knowing and voluntary relinquishment of his federal right. This court's recent discussion in Gates v. Henderson, _____F.2d_____ (Docket No. 76-2065)(2d Cir. January 12, 1977) makes the point:

> " Even if holding as to state law were explicit, moreover, it does not follow that this state procedural ground would give the district court power to deny federal habeas relief. Under Fay v. Noia, supra, such power exists only if the procedural default in the state courts amounted to a "deliberate bypass" of state procedures. 372 U.S. at 438. See also Lefkowitz v.Newsome, 420 U.S. 283,290 n.6 (1975). Under that test, the federal habeas court must make an "independent determination" that the habeas petitioner -- assisted by counsel but making the final

> decision himself-- "understandingly and knowingly forewent the privilege of seeking to vindicate his federal claims in the state courts..." 372 U.S. at 439. See also id. at 433-37. No such determination was made by the district court here, nor is there any indication in the record that appellant knowingly waived his federal claims. On the contrary, his counsel was at least asserting some constitutional claim in respect to the evidence by his objection; doubtless appellant would have thought such an assertion procedurally sufficient."

Slip op. at 1357.

In Gates the prosecution introduced fingerprint evidence obtained after the defendant's arrest. No pretrial motion to suppress was made. During trial, counsel objected to the evidence on unspecified constitutional grounds. The trial court summarily overruled the objection. The state appellate courts affirmed the ruling on the theory that the objection had never been made and the issue was waived. The federal habeas corpus court noted the objection, apparently invisible to the state courts, but held that the objection was not specific enough and being thus waived in state court was barred from federal habeas corpus review.

This Court reversed. First, it found the state court's statement of its reasoning and conclusion on the sufficiency of the midtrial objection inadequate and held it improper for the habeas corpus court to dismiss the petition on the basis of its speculation on the meaning of the state court's holdings.

More importantly for the analysis here, this Court

went on to hold that even an explicit state court ruling would not empower the federal habeas corpus court to dismiss the petition. In the language quoted above, this court equated the doctrine of procedural default with the concept of deliberate bypass and held that the habeas corpus court had to make its own factual determination that the defendant himself "understandingly and knowingly forewent the privilege of seeking to vindicate his federal claims in the state courts". Slip opinion at 1357.

Having stated the test, this Court then noted that the defendant Gates undoubtedly would have considered his counsel's objection procedurally sufficient. Such a frame of mind is irreconcilable with the notion of a knowing and voluntary waiver.

Under that rationale the conclusion is even more compelling that LiPuma did not knowingly and voluntarily waive his motion. As the district court found, he had hired an investigator to prepare for the motion who produced helpful evidence and had erroneously been informed by counsel that the motion to suppress had been made pretrial.

In further support of its conclusion of no intelligent waiver the Gates court found that there was no conceivable tactical reason for a waiver and noted that even a total failure to object which was inadvertant could not be a deliberate bypass. Again the Court's language fits squarely

here:

> "Given the vital importance of the fingerprint evidence to the State's case, it would have been senseless for appellant to have waived any available objection to the admission of the evidence. No trial tatic by anyone could conceivably involve omission to make such an objection. This court has recently held that failure to object at all to a charge to the jury did not constitute deliberate bypass, when the petitioner's trial strategy indicated that the lack of objection was inadvertent. Kibbe v. Henderson, 534 F.2d 493, 496-97 (2d Cir. 1976), petition for cert. filed, 45 U.S.L.W. 3005 (U.S. July 1, 1976) (No. 75-1906). It follows a fortiori that, when a lack of objection would have been virtually fatal to the petitioner's case, and when an objection was in fact made on constitutional grounds, the petitioner cannot be said, in the absence of clear evidence of a knowing waiver, to have deliberately bypassed the state courts."

Slip opinion at 1357-58.

The district court found the appellant's assertion of strategic waiver totally unfounded (A28-29), and the appellant concedes that counsel's failure to make the motion was, at least, error resulting from neglect (Appellant's brief at 22). Thus, even appellant's grudging concessions are irreconcilable with a finding of the defendant's intelligent waiver, necessary to divest the district court of jurisdiction.

The appellant also relies on the Supreme Court's opinion in Stone v. Powell, ___U.S.___, 44 U.S.L.W. 5313 (July 6, 1976) which held that when a state has provided a full and fair opportunity to litigate Fourth Amendment claims, federal habeas corpus jurisdiction may not be invoked to relitigate the claims.

Although complete standards for the new concept of full and fair opportunity can only emerge from the varying fact patterns of case by case determination, one opinion already provides an excellent example of what it is not.

In United States ex rel. Petillo v. New Jersey, 418 F.Supp. 686 (D.N.J. 1976) the court held that New Jersey law which precluded any attack on a warrant predicated on perjurious information, did not provide the defendant with an adequate opportunity to litigate Fourth Amendment claims. While Stone v. Powell, supra would see, to empower the district court to litigate the Fourth Amendment claims in a habeas corpus hearing after finding the state forum inadequate, the court disposed of the matter differently. It directed the state courts to vacate all aspects of the conviction and to permit the necessary suppression hearing before the next trial.

Apart from the issue of what constitutes a full and fair opportunity under Stone is the further question of the relationship of the new concept to the doctrines of adequate state ground and deliberate bypass. This Court's opinion in Gates also reaches that issue. After concluding that Stone had neither eliminated nor modified those doctrines, the Court held that since there was no deliberate failure to make the motion to suppress, the state court's refusal to entertain it deprived the defendant of a full and fair

opportunity to litigate his claim.

Read together Petillo and Gates provide a reasonable and simple approach to the concept. A full and fair opportunity means, first, that the state must have institutionalized provisions adequate for the litigation of Fourth Amendment claims in every case, and second, that in no case may a defendant be denied that opportunity by invalid notions of waiver. The opportunity must exist on the face of the state law and as applied in each case.

What is at issue in this case is not the adequacy of New York's provisions for motions to suppress in the abstract but this concrete application here. This Court's opinion in Gates mandates the conclusion here that there being no knowing and voluntary waiver by LiPuma here, the state trial court's refusal to permit his motion to suppress deprived him of the full and fair opportunity to present his claim mandated by Supreme Court in Stone.

POINT IB

SINCE THE PETITIONER WAS NOT AFFORDED A FULL AND FAIR OPPORTUNITY TO LITIGATE HIS FOURTH AMENDMENT CLAIMS IN THE STATE COURTS, THE DISTRICT COURT WAS JURISDICTION UNDER THE AUTHORITY OF STONE V. POWELL TO ADJUDICATE THOSE FEDERAL CLAIMS, AND THIS COURT SHOULD MODIFY THE RELIEF ORDER HEREIN ACCORDINGLY.

Likewise, in this case, the relief ordered by the district court was a direction to the state court to the making of the motion to suppress. However, such a result is inconsistent with the theory of Stone. The issue whether the state court provided "a full and fair" opportunity to litigate Fourth Amendment issues is a jurisdictional question to be resolved by the habeas court. If answered affirmatively, the district court must decline jurisdiction to avoid duplicating adequate state court proceedings. If answered negatively, the district court had jurisdiction to entertain the Fourth Amendment claims unfairly barred in state court and should exercise that power by deciding the merits of the motion.

Under the rationale of the relief ordered in Petillo, the question of the adequacy of the state forum is not a threshhold jurisdictional issue, but the ultimate substantive claim determined by the habeas corpus court.

Apart from the obvious lack of harmony with the very language and stated purpose of Stone, the Petillo result

has unintended and undesirable consequences. Brief consideration will illuminate the latent problems.

If the habeas court decides the jurisdictional question against the petitioner, there is no further possibility of Fourth Amendment litigation and the only issue to be reviewed is the correction of that decision. If that issue is resolved in the petitioner's favor, an appeal will usually follow.* Only after thorough review of that question will the case be remanded to the state court to commence litigation of the Fourth Amendment issues, ultimately the heart of the habeas corpus petition, now left in limbo while new procedural questions are litigated in the federal courts in their stead.

Curiously, the vindication of the petitioner's position that his Fourth Amendment claims were unfairly barred, is remedied by additional delay and costly litigation. Almost inevitably the victorious petitioner has been convicted and is incarcerated, conditions which make both time and money, always precious commodities, immeasurably dearer.

In addition, the discretionary power is less likely to be extended to the petitioner when the critical issue upon which the validity of his incarceration depends, the resolution of his Fourth Amendment claims, is a remote event.

*Interestingly the state's right to appeal an adverse district court ruling is automatic while the petitioner's appeal of an unfavorable decision is discretionary.

A second factor complicates and lessens the likelihood of bail. In determining whether to grant bail, the federal district court must and should consider all relevant factors, probably the most significant being the likelihood of petitioner's success with his Fourth Amendment claim in state court. However, since it is not the forum which will ultimately decide that issue, its grasp of the issue will be less than complete if not superficial for lack of any state court record. Further, the pragmatic reality is, that the district court wi l hesitate before explicating its bail decision on the record at least regarding the merits of the motion to suppress. Human nature operating even in the best of the bar, the party favored by the district court's views on the Fourth Amendment issues, will utilize them as persuasive and even controlling federal authority - virtually the law of the case. Such predictable strategy can only inhibit the district court's full explication of its factual determinations on the bail issue, thus thwarting statutory and policy considerations by impeding appellate review of the bail decision.

Thus, the absurd anomaly, results that the federal court, in vindicating the petitioner's right to litigate his federal claim, has further delayed the implementation of that right by creating for itself new rounds of litigation

devoted solely to exploring questions of state procedural law while the state courts already condemned for their disregard of federal claims await a second bite at petitioner's appeal.

In sum, the Petillo remedy, rather than the delicate principle of federalism, to each his own, creates an intragovernmental foreign exchange program, where the federal courts propound state law and the state courts construe vital federal right.

POINT II

THE DISTRICT COURT'S DETERMINATION THAT THE PETITIONER WAS DEPRIVED OF THE EFFECTIVE ASSISTANCE OF COUNSEL, BASED, AS APPELLANT CONCEDES,UPON THIS CIRCUIT'S PREVAILING STANDARD AND APPLIED TO SUBSTANTIALLY UNDISPUTED EVIDENCE MUST BE AFFIRMED.

As the analysis in Point I demonstrates, the petitioner has been denied the opportunity to advance substantial Fourth Amendment claims and, solely on that basis is entitled to the granting of his petition. In addition this case presents the not uncommon phenomenon that the same operative facts also demonstrate the deprivation of still another fundamental right, the effective assistance of counsel. Viewed from this constitutional perspective as well, the petitioner's motion for a writ of habeas corpus should have been and indeed was granted by the district court. Compare United States ex rel. Maselli v. Reincke, 383 F.2d 129 (2d Cir. 1967) where the Court held that the ineffective assistance of counsel also deprived the defendant of his right to appellate review of his conviction.

Indeed, it arises from the natural order of our adversary system that the injury sustained by deprivation

of the effective assistance of counsel will impair and sometimes totally obliterate other fundamental rights. The Sixth Amendment guarantee of the effective assistance of counsel is, in a pragmatic sense, the most crucial of rights since it is only through counsel that all other rights are asserted.

It is a fundamental and inevitable condition of the adversary system that the statutory and constitutional rights; whose elaboration and enforcement are the sole justification for our elaborate judicial system, depend finally on the skills of counsel for their transformation from rhetoric to reality.

Recognizing their finite human capacities and infirmities, courts have justly required that "waivers"* of fundamental rights executed by counsel, reflect the knowing and voluntary act of the defendant. Johnson v. Zerbst, 304 U.S.458 (1938).

Reflecting those concerns, this Court said in United States v. Sanchez, 483 F.2d 1052 at 1057 (2d Cir. 1973):

> Be that as it may, however, our inquiry does not end there, for a defendant is not lightly to be penalized for the lack of

*Even where the "waiver" is executed by the defendant himself, as in consent searches, courts place a heavy burden on the prosecution to demonstrate the knowledgeable and voluntary character of that act. Compare also the advice requirements of Miranda which emanate from the same concern for waiver of Fourth, Fifth and Sixth Amendment rights.

> assiduousness on the part of counsel upon whom he relies. In situations wherein a defendant alleges ineffective assistance of counsel, we must determine whether counsel's overall representation of defendant (whether through counsel's own performance, or as it is affected by the actions of the trial court) was "so woefully inadequate 'as to shock the conscience of the Court and make the proceedings a farce and mockery of justice.'"

483 F.2d at 1057.

See Diggs v. Welch, 148 F.2d 667 (D.C. Cir.), cert denied 325 U.S. 889 (1945), United States v. Wight, 176 F.2d 376 (2d Cir. 1949), cert denied 338 U.S. 950 (1950).

Countervailing these considerations, is the recognition that the conduct of a trial, is both art and science, involving as it does the employment of strategy and the exercise of discretion. Nor are claims of ineffective assistance of counsel a recent trend. Hence standards for evaluating counsel's performance were formulated long before the development of other constitutional protections, primarily under the Fourth, Fifth and Sixth Amendments, which have radically altered criminal litigation. The contemporary criminal practitioner, must be litigator and, legal scholar.

Thus what constitutes the effective assistance of counsel corresponds directly to substantive and procedural developments in the criminal law. This notion perfectly reasonable on its face, is further reinforced by the corallary

concept that the right to counsel exists at every critical stage of the criminal proceeding, not merely at trial.*

Accordingly, counsel's performance at all phases of the case is subject to scrutiny.

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*Similar views on this issue have resulted in the modification of the standard for measuring counsel's competence, in several federal circuits. See e.g. United States v. DeCoster, 487 F.2d 1197 at 1202 (D.C.Cir. 1973) adopting the standard of "reasonably competent assistance of an attorney acting as his diligent conscientious advocate." This Court has as yet declined to do so. See Rickenbacker v. Warden, F.2d (1976) where this court noted the issue of reconsidering the standard but declined to do so in that case because counsel's performance passed muster under either test. It is respectfully suggested that this case presents precisely the factual context for this Court's adoption of the "reasonable competence" test since counsel's dereliction occurred pretrial, in failing to make motion to suppress, an omission resulting from the division of labor between "law man" responsible for making pretrial motions and the trial partner (A 29). The Court might take judicial notice that this type of professional association is more the rule than the exception in law firms devoted primarily to criminal litigation in our Circuit, an arrangement virtually compelled by the ever accelerating growth and change in criminal procedure and the expanding use of criminal sanction to regulate previously immune economic activity. When coupled with the speedy trial rules which keep criminal litigators on trial and out of the library, the division of responsibility is inevitable.

Thus, in Maselli v. Reincke, 383 F.2d 129 (2d Cir. 1967) counsel's post trial failure to perfect the defendant's appeal was condemned by this Court as the ineffective assistance of counsel. Similarly in United States v. Sanchez, 483 F.2d 1052 (2d Cir. 1973) this Court recognized that the failure to make a pretrial motion could constitute ineffective assistance of counsel, but found the motion to suppress in that case totally futile and the failure to make it no dereliction of counsel's duty.

Omissions by counsel, pretrial, clearly form the basis for claims of ineffective assistance of counsel. See United States ex rel Mitchell v. LaVallee, 417 F.Supp. 154 (S.D.N.Y. 1976). In United States ex rel. Thomas v. Zelker, 332 F.Supp. 595 (S.D.N.Y. 1971) the Court found the failure to investigate potential witnesses supported the petitioner's claim. It rejected the suggestion of "strategy" soundly reasoning that strategy and tactical judgments require informed and prepared counsel.

Refining the concept slightly, it is also clear that failing to make a meritorious motion to suppress supports a claim of ineffective assistance of counsel. United States v. Easter, 539 F.2d 663 (8th Cir. 1976) is just such a case. Appellant's reliance on Brown v. Swenson, 487 F.2d 1236 (8th Cir. 1973) is somewhat stale (Appellant's brief at 23).

Further, counsel's dereliction here involved not only the omission of a meritorious suppression motion going to the heart of the people's case but his misstatement to his client that the motion to suppress had been made when in fact it had not.

In Mosher v. LaVallee, 491 F.2d 1346 (2d Cir.), cert denied 94 S.Ct. 1611 (1974) this Court found counsel's misstatment to his client concerning a promise of a minimum sentence, which had in fact not been made, to constitute the ineffective assistance of counsel. There the misstatement induced reliance in that the client waived his right to a trial and pled guilty. Here it caused the loss of an equally critical right under the circumstances of this case.

This Court's opinion in Maselli, supra enunciates other principles relevant to this case, that a defendant is not presumed to acquiesce in errors of counsel even where he is retained and rejects the notion that the incompetence must be such that the trial court may notice and correct it. 383 F.2d at 133. Both of these arguments are erroneously advanced by the appellant.

In light of these principles the district court's order was entirely correct and must be affirmed. Appellant

concedes that the district court employed the prevailing standard in this Circuit (Appellant's brief at p.20).

Appellant's argument rests on the notion that competence is measured solely by conduct at trial (Appellant's brief at p.21). As the cases discussed above demonstrate this is totally erroneous. Appellant also urges reliance on the state trial court's comments on counsel's competency and urges that the district court erred in failing to pay deference to them (Appellant's brief at p.21). The suggestion is absurd and demonstrates the lack of merit in Appellant's position. The federal habeas corpus court is empowered, indeed required to draw its own conclusion of law on the very federal question which the petition presents.

Appellant also attacks the district court's conclusion that the failure to make the motion to suppress cannot be characterized as harmless beyond a reasonable doubt.

Their main contention is that the district court arrived at that conclusion only by relitigating the merits of the motion to suppress evidence of Mrs. Geibel's lineup identification which they characterize as an unlawful usurption of power. The district court did no such thing. It evaluated the quality of the only evidence which could survive a successful motion to suppress, one eye witness. The test applied by the district court was whether, beyond a reasonable doubt, petitioner would have been convicted

solely on Mrs. Geibel's testimony, not the test for admissibility of evidence of her lineup identification. The district court's conclusion that this was no harmless error is adequately supported by its detailed factual statement.

The appellant also urges the motion to suppress lacked merit. The shortest answer to this incredible assertion is the trial court's comments finding that petitioner had standing, that Doyle did not consent to the search and that no exigent circumstances existed to justify the warrantless search. The district court's conclusion that the motion to suppress was meritorious, far from being unsupportable, is virtually uncontestable. Appellant's other assertions do not warrant further response with one exception.

Appellant's brief at p.17 contains the following assertion as part of its statement of "Facts" (Appellant's brief at p.3).

"The assistant district attorney said he and defense counsel had thought the motion would be 'inappropriate' (14)".

The reference to(14),perhaps inadvertantly, but correctly leads nowhere. The factual assertion presumably is included to counter the district court's substantially based factual findings that counsel, armed with the client's

version of the events, as well as Doyle's and the results of paid investigative efforts, recognized, pretrial, both the viability and importance of the motion to suppress.

Apparently, to show counsel had no such awareness pretrial, Appellant presents to this Court as "fact" the statement of Mr. Kreidman which can be located in the minutes of the sentencing proceeding at p.14. However, Kreidman was never called as a witness by the people, on the habeas corpus hearing. Hence, the district court had no opportunity to evaluate this proferred "fact" and its appearance here is "afterthought".

CONCLUSION

FOR ALL OF THESE REASONS THE ORDER OF THE DISTRICT COURT GRANTING THE WRIT OF HABEAS CORPUS SHOULD BE AFFIRMED AND THE PETITION SHOULD BE REMANDED TO THE DISTRICT COURT WITH DIRECTION THAT IT ENTERTAIN THE PETITIONER'S MOTION TO SUPPRESS.

Respectfully submitted,

NANCY ROSNER, ESQ.

ROSNER

STATE OF NEW YORK)
: SS.
COUNTY OF RICHMOND)

ROBERT BAILEY, being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at 286 Richmond Avenue, Staten Island, N. Y. 10302. That on the 28 day of ~~MXXX~~ March 1977 deponent served the within BRIEF upon

Hon. Louis J. Lefkowitz, Attorney General

attorney(s) for

Respondents-Appellants

in this action, at

2 World Trade Center, NYC

the address(es) designated by said attorney(s) for that purpose by depositing 3 copies of same enclosed in a postpaid properly addressed wrapper, in an official depository under the exclusive care and custody of the United States post office department within the State of New York.

ROBERT BAILEY

Sworn to before me, this 28 day of March , 1977

WILLIAM BAILEY
Notary Public, State of New York
No. 43-0132945
Qualified In Richmond County
Commission Expires March 30, 1978